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Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 469.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF HENRY J. LARKIN, D/B/A LARKIN COMPANY, *Petitioner,*

v.

PLATT CONTRACTING CO. INC., CONTINENTAL CASUALTY COMPANY AND AMERICAN EMPLOYERS INSURANCE COMPANY, *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondents oppose the petition filed herein to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on July 5, 1962, and pray that the petition be dismissed and certiorari denied.

Opinion Below.

The opinion of the Court of Appeals for the First Circuit is reported at 306 F. 2d 724.

Jurisdiction.

The complaint alleges a cause of action under the Miller Act, 40 U.S.C. §§ 270a-d. Jurisdiction is conferred upon the United States District Court in actions instituted pursuant to that statute.

Counter-Statement of the Questions Presented.

The statement of "Questions Presented" in the petition is an admixture of assumptions, argument and gratuitous and self-serving statements. They are the same "questions" as those argued before the Court of Appeals. It would serve no useful purpose to discuss them, since in large measure they have not been cast in intelligible form and they present abstractions totally unrelated to the basic and substantial issues presented for determination to the master and thereafter to the trial judge. The record on appeal to the Court of Appeals presented this question: "Were the findings of fact of the trial Court clearly erroneous?"

Counter-Statement of the Case.

The complaint in this case was brought under the Miller Act (40 U.S.C. § 270b) upon the standard form of Payment Bond executed by the respondent Platt Contracting Co. Inc., hereinafter called "Platt," as principal, and the respondents Continental Casualty Company and American Employers Insurance Company as sureties, hereinafter called "the sureties."

Platt was the prime contractor under a contract with the United States dated December 13, 1954, identified as contract DA-19-016-ENG. 3524, for the construction of Build-

ing F of the Geophysics Laboratory at the Bedford Research Center in the Town of Bedford, Massachusetts, for the sum of $1,323,000, later increased by additions to $1,662,968.21. In connection therewith the sureties executed and delivered to the United States the Standard Performance and Payment Bonds. The Payment Bond, upon which this suit is brought, was dated December 13, 1954, and was in the penal sum of $529,200.

On February 17, 1955, Larkin entered into a sub-contract with Platt to furnish all materials and perform all labor and complete all of the work itemized in the agreement in accordance with the general conditions of the general contract between the United States and Platt, and the plans, drawings and specifications prepared by the Department of the Army and Shepley, Bullfinch, Richardson and Abbott (R. 43-46).

The work to be done by Larkin consisted of plumbing; gas fitting; steam-heating system; chilled-water distribution in building; mechanical exhaust system; mechanical ventilating system; air-conditioning system; exterior underground sanitary and drainage; exterior underground steam distribution; exterior underground chilled-water distribution; modifications to existing buildings covered by the above items; to include all transite board and ducts; unistrut or equal hangars and inserts in concrete; manhole fittings as required "for the above referenced work items." During the progress of the work certain modifications were made in this work and change orders were issued thereon, resulting in increases to Larkin's contract price.

In paragraph 10 of his complaint filed on May 21, 1958, Larkin stated that, "Beginning after February 17, 1955, and prior to May 18, 1957, the plaintiff performed all of its obligations under the terms of the sub-contract and duly authorized change orders both written and oral."

In paragraph 11 he recited that "The defendant Platt has paid to the plaintiff, on account of the plaintiff's performance of the said subcontract and said changes thereto, the sum of $222,522.00. There remains unpaid the sum of $111,436.40 which is due and owing to the plaintiff from the defendant Platt, together with interest from May 18, 1957 on which date demand for payment was duly made."

In paragraph 12 Larkin states that "This action is brought more than ninety days since the above described labor and materials were furnished by the plaintiff to the defendant, Platt, and prior to the expiration of one year from the date of final settlement of the said prime contract," which date is alleged to be May 24, 1957.

The complaint was drawn by George Foley, Esq., and Remsen M. Kinne, III, Esq., of the firm of Hale and Dorr (R. 7-10).

On September 28, 1960, Larkin filed a motion to amend wherein he "requests that he be paid a fair value for the work done in view of the defendant's answer to the original Complaint." He also stated therein that the "Defendants" prevented him from completing his contract "by paying the final bills on his subcontract because they did not pay him in accordance with the terms thereof," and claimed that he was entitled to a judgment of $536,873.85, with interest to date. He further included in the motion a demand for trial by jury (R. 13). The motion to amend was allowed except as to the jury claim, which was denied (R. 3). On October 17, 1960, the Court appointed a master to hear this case in accordance with the provisions of Rule 53(e) of the Federal Rules of Civil Procedure, pursuant to the agreement of the parties to such reference (R. 3). The master's report was filed on October 19, 1961 (R. 16-24). Larkin filed objections thereto (R. 25-26), which were overruled after hearing (R. 29), as was his motion to recommit (R. 27) and a "motion to consolidate" (R. 28), which related to a suit he had recently brought.

On December 6, 1961, Judge Ford entered an order confirming the master's report on the motion of the respondents herein, accepting and adopting the master's findings of fact and overruling Larkin's objections. The judge ordered judgment for the plaintiff in the amount of $6,051.64, with interest from May 21, 1958, without costs. Larkin appealed from this judgment.

Argument.

A.

The Findings of the Trial Court were Clearly Correct.

Rule 52(a) of the Rules of Civil Procedure provides in part that, in actions tried without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," and "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

On motion of these respondents the trial judge confirmed the master's report in the following language: "The Master's Findings of Fact are accepted and adopted by this Court. The objections to the Master's Report, filed by the plaintiff, are overruled" (R. 29).

The master's findings of fact therefore were the findings of the trial judge on the record upon appeal to the Court of Appeals.

Subdivision (a) of Rule 52, providing that findings of fact shall not be set aside unless clearly erroneous, in substance confirms and continues the earlier practice which obtained in equity and makes it applicable to all trials before a judge.

United States v. *Aluminum Co. of America*, 148 F. 2d 416 (C.C.A. 2d, 1945).

The findings of a master, upon adoption by the trial court, are conclusive and binding upon the appellate court "unless clearly erroneous." The cases are legion in which this principle has been stated and affirmed, and it would serve no useful purpose to multiply citations on this proposition. Illustrative cases follow:

Crimmins v. *Woodson*, 177 F. 2d 788 (C.A. 1st, 1949).

Sachs v. *Ohio National Life Insurance Co.*, 148 F. 2d 128 (C.C.A. 7th, 1945); cert. den. 326 U.S. 753.

The evidence offered in this case consisted largely of the testimony of Larkin personally. He acted in the dual capacity of counsel and witness. In its opinion the Court of Appeals stated: "We have reviewed the Master's Report in the light of the testimony and exhibits. We find no error."

B.

The contention of the petitioner that the master was in error in accepting a letter dated May 23, 1957, from respondent Platt to Larkin as an accounting rather than as "an offer of compromise" was considered by the Court of Appeals and found to be without merit. To the extent that the master's finding was a determination of fact which rested upon this letter and the testimony of Larkin and Hurwitz, accountant for the respondent Platt, the master's finding of fact as adopted by the trial court was final. In any event, the Court of Appeals had before it the testimony and exhibits and it too could draw the same conclusion therefrom as that arrived at by the master. Since the master's interpretation of the letter and his finding that it was not an offer of compromise but a statement of ac-

count by Platt according to its records and as testified to by Hurwitz, its accountant, there is no need to discuss the law relating to admissibility in evidence of offers of compromise.

On page 8 of his petition the plaintiff assigns his "reasons for granting the writ." We have already dealt with "reason" number 1. "Reason" number 2 alleges that "the District Court was in error in refusing to allow the plaintiff to put in evidence of the value of the labor and materials furnished," this being the so-called claim in "quantum meruit." The latter claim has been summarily dealt with by the Court of Appeals in these words: "Larkin's claim to recover for all work and materials on the basis of a quantum meruit in disregard of the contract is contrary to established principles."

> *Jefferson Construction Co.* v. *United States* (C.A. 1st, 1960), 283 F. 2d 265; cert. den. 365 U.S. 835.

The Petition should be Denied.

The respondents assert that this petition is without merit and should be denied. No question has been presented involving an interpretation of the statute under which the complaint was brought (Miller Act, 40 U.S.C. §§ 270a-d); the decision of the Court of Appeals is not shown to be in conflict with the decision of another Court of Appeals on the same matter; no important question of local law has been decided in a way as to probably bring it into conflict with applicable local decisions and there is no conflict between the decision herein and other applicable decisions of this Court. The petitioner has had a full and fair trial before a master whose findings were reviewed by the trial court, and again considered by the Appellate

Court. There is nothing in the entire record to indicate that there was any departure from the accepted and usual course of judicial proceedings during trial or upon review. The decision of the Court of Appeals with reference to the alleged "offer of compromise" was resolved as at common law and is in consonance with reason and equity and does not call for further examination by this Court. The petitioner's complaint that he was entitled to put in evidence the fair value of his labor and materials in the light of the allegations of his complaint that he had fully completed his contract does not merit any consideration.

Jefferson Construction Co. v. *United States* (C.A. 1st, 1960), 283 F. 2d 265; cert. den. 365 U.S. 835.

The respondents say that no basis exists for the grant of a writ of certiorari under the established rules of this Court, and request that the petition be denied.

Respectfully submitted,

JOHN W. BLAKENEY,
Attorney for Respondents.

FRANCIS L. SWIFT,
Of Counsel.